

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC84816**

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**BUCHHOLZ MORTUARIES, INC.,**

**RESPONDENT**

**v.**

**DIRECTOR OF REVENUE,  
STATE OF MISSOURI,**

**APPELLANT**

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**ON PETITION FOR REVIEW  
FROM THE ADMINISTRATIVE HEARING COMMISSION,  
THE HONORABLE KAREN A. WINN, COMMISSIONER**

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**BRIEF OF RESPONDENT**

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BUCHHOLZ MORTUARIES, INC.**

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## **STATEMENT OF FACTS**

### **I. PROCEDURAL HISTORY**

Respondent Buchholz Mortuaries, Inc. (“Buchholz”) is a Missouri corporation that provides funeral services at four locations in the St. Louis Metropolitan area. See Stipulation of Facts (“SOF”) 1 at LF 110.

Buchholz filed a Form 472B, Missouri Application For Sales/Use Tax Refund/Credit for the Refund Period on or before January 31, 2001 (“Refund Claim”)(LF 110--SOF 2). The Refund Claim sought a refund of Missouri sales tax in the amount of \$101,819.72 (the “Refund Amount”) that was paid by Buchholz on the sale of certain caskets and burial containers during the period of December 1, 1997 through November 30, 2000 (the "Refund Period") (LF 110--SOF 2; Exhibit A). The Refund Amount is comprised of the following:

- A. The excess of the sales tax on the sale price of certain caskets less the sales tax that would have been paid on Buchholz’s purchase cost of such caskets, in the amount of \$71,889.21 (LF 115--SOF 27).
- B. Sales tax on the sale price of burial containers in the amount of \$29,930.51 (LF 115—SOF 28).

On February 27, 2001, the Director denied the Refund Claim, stating that "items identified in claim do not become affixed to real property, therefore, subject to tax" (LF 212).

Buchholz appealed the Director's denial to the Administrative Hearing Commission. Commissioner Karen A. Winn ("Commissioner") heard the case on April 22, 2002. The Director did not offer any evidence beyond the cross-examination of Petitioner's witnesses. On August 29, 2002, the Commissioner issued her decision (the "Decision") granting Buchholz's refund claim in the amount of \$101,565.17 (LF 9 et seq.).

## **II. FACTUAL BACKGROUND**

### **A. Funeral Services**

Funeral directing is a service business (T 25, l. 5-7). Buchholz offers its customers a broad range of services and related products. The Missouri Code of State Regulations require that a licensed funeral director direct and control the service from the initial collection and preservation of the deceased's remains to the final disposition of the remains and characterizes violations of that duty as "misconduct" (See 4 CSR 120-2.060(12-14, 19); 4 CSR 120-2.070(23)<sup>1</sup>; LF 112--SOF 10; T 15, l. 20-25, T 16, l. 1-13; T 20, l. 25 and T 21, l. 1-7). Every customer must also purchase Buchholz's basic funeral services authorizing Buchholz to supervise, direct and coordinate the funeral service and burial (T 47, l.

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<sup>1</sup> These cites are to the current Missouri regulations. The regulations in effect during the Refund Period were identical other than numbered as different subsections.



11-23; T 16. 1. 23-25 and T 17, 1.1-2). This is a non-declinable expense (T 47, 1. 11-18).

Buchholz' direction of the burial is an expected and integral component of Buchholz' customer relationships:

Q. Is it a fair statement that in all these cases the customer fully expects Buchholz to see the process through to a completed burial?

A: Definitely.

(T 17, 1. 3-6).

Q: Has it been your experience that customers consider it to be a very important part of your contractual relationship that you ensure that a container is installed and the casket is ultimately placed correctly for burial?

A. That is correct.

(T 18, 1. 14-20).

Payment under the contract is due "at the date of service" (LF 213).

Within these regulatory and contractual limitations, Buchholz endeavors to accommodate the typical requests from customers relating to services, visitation and burial:

Q: Now at the point in time that the remains are embalmed and placed into the casket, the controls over what can and can't be done and who can and can't do it with respect to that casket become much more stringent, don't they?

A: That's correct.

Q: And, in fact, a customer -- one of your customers cannot tell you what to do with a casket, correct?

A: They have tried.

Q: Right, but they can't do it, correct?

A: No.

Q: A customer can make a request, correct?

A: That's right.

Q: And it is up to you to determine whether the customer's request for a visitation or for a service at a particular place and location is an appropriate request, correct?

A: Uh-huh, that's correct.

Q: Yes. And then once that request is made and if you deem it to be appropriate given your regulatory requirements, then you will supervise any visitation or any service, correct?

A: That is correct.

Q: Your customers -- strike that. In the instances where -- and again hopefully a rare instance where the customer becomes dissatisfied with your service and would like for you to transfer the casket to another funeral home -- do you remember those questions?

A: Uh-huh.

Q: You have to say yes.

A: Yes. I'm sorry.

Q: In those instances if it was appropriate, given the regulatory requirements, for you to authorize the transfer of the casket to a competitor, you would request payment in full at that time, wouldn't you?

A: That is correct.

Q: Okay. And we wouldn't be here asking for a refund of any sales tax on that transaction because you would have transferred the casket to the customer before it's buried, correct?

A: That is correct.

(T 49, l. 4-25, T.50, l.1-22). Buchholz does not and cannot delegate its responsibility for the burial or its dominion over the casket and burial container to the customer at any point (T 64, l. 7-23).

**B. Caskets and Burial Containers**

Most customers request that Buchholz provide the casket and will generally choose the type and style of casket. Casket prices vary based upon the casket's style and its material composition. On rare occasions, customers purchase caskets standing alone, presumably for use in other pre-arranged funeral services performed by a different funeral home. These rare sales are not included in the Refund Claim (T 16, l. 16-22).

A casket may be placed directly in the grave or the customer may choose to have the casket housed in an outer burial container. Burial containers are large rectangular boxes that weigh up to 3000 pounds which prevent grave sinkage and erosion and also retard the decomposition of the casket by preventing soil and water from making contact with the casket (LF 113--SOF 16). Many

cemeteries require the use of a burial container. Buchholz offers its customers a selection of two general types of containers as part of its funeral services:

- A. A “vault” is a two-piece burial container consisting of a box and a lid that provides a seal. Vaults are typically constructed of metal or concrete (LF 113--SOF 17a).
- B. A “box” is a two-piece burial container consisting of a box and a lid that does not provide a seal. Boxes are typically constructed of fiberglass or concrete (LF 113--SOF 17b).

Buchholz purchases the burial containers from third party vendors/contractors (LF 113--SOF 19). Without exception, Buchholz’ purchase of a burial container includes the container company’s services to deliver and install the burial container and the casket into the gravesite (T 51, l. 3-9). *See also* LF 224--Petitioner’s Exhibit No. 3, which provides a price list from the largest supplier of burial containers to Buchholz, Wilburt Vault Company.<sup>2</sup>

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<sup>2</sup> The price list states separate charges for the delivery, installation and sealing of vaults and separate charges for delivery and installation of concrete grave boxes. Exhibit A to the Stipulation of Fact includes copies of sample invoices from Wilburt Vault Company to Buchholz, which include charges labeled as “other charges,” which are for delivery, installation and sealing.

**C. The Burial Service**

Neither Buchholz nor the customer views the burial container prior to purchase (LF 113--SOF 19). Instead, as part of its contract with Buchholz, the burial container company delivers the burial container to the gravesite and ensures that it is ready to accept the casket ( T 55, l. 10-25; T. 56, l.1; T. 58, l. 8-25; T. 59, l.1-7).

Buchholz transports the casket to the cemetery after any visitation and/or other funeral services at the mortuary or church (LF 115--SOF 25). A Buchholz funeral director accompanies the casket to the gravesite to observe the interment of the deceased (LF 115--SOF 26; T 34, l. 12-24).

As part of its contracted for installation services, the burial container company will place the casket into the burial container after any graveside ceremony. If a vault is purchased, the burial container company provides the specialized labor and equipment to: (i) place the casket into the vault, (ii) seal the vault, and (iii) lower the vault to the bottom of the grave (LF 113-14--SOF 20; *see generally* testimony of Stephen Zell at T 53 et seq.).

If a box is purchased, the burial container vendor places the open container into the bottom of the grave with its lid off to the side (LF 114--SOF 21). The vendor also provides the labor to: (i) lower the box to the bottom of the grave, (ii) lower the casket into the box, and, in most cases, (iii) place the lid on top of the box (SOF 21). In all cases, the burial container vendor assumes responsibility for closing the box (LF 114--SOF 21; T. 64, l. 7-23). However, in

some cases, the burial container vendor may request that the cemetery personnel place the lid on the box. *Id.*

Once installed, burial containers cannot be moved without the use of heavy earth-moving equipment and, in many instances, specialized lifting devices (T 57, l. 15-17).

Buchholz is responsible for any loss or damage to the casket and burial container until they are buried in the grave (T 18, l. 21-25; T 19, l. 1-8; T. 59, l. 25; T. 60, l. 1-10). Buchholz maintains business insurance to cover damage to caskets and burial containers that may result from its services or other third-parties that handle these items (LF 94-101 which includes excerpts from Buchholz' business insurance policy<sup>3</sup>).

As testified to by Stephen Zell, funeral customers understand and expect that they are purchasing a completed burial:

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<sup>3</sup> The Funeral Director's Professional Liability policy states in Section A.2.b that the Exclusions for "Professional Services" at Exclusions paragraph 1j does not apply. In addition, Section A.2.c. states that Exclusions paragraph 1.k.4, relating to "property damage" does not apply to dead bodies, any casket, urn or other container for a dead body or its cremated remains . . .while in the care, custody or control of the insured, or while in the care, custody or control of others because of any rendering or failure to render professional services in connection with the insured's business as a funeral director.

Q: And it's been your experience both as a funeral director and a cemetery owner that the family believes and understands that they're buying a vault in the ground buried with a casket, correct?

A: Yes.

(T 64, l. 19-23).

Both Buchholz and its customer intend that the burial constitutes the deceased's final resting place:

Q. And certainly at the time that the casket is placed into the vault or box and the remains are buried, it's your intention and your customer's intention that this be a final resting place for the deceased?

A. That's -- 99 and three-quarter's percent of the time, yes.

(T 48, l. 16-22).



## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Mo.Rev.Stat §621.193 governs the Court's standard of review in full as follows:

In cases reviewable under the provisions of section 621.189, the decision of the administrative hearing commission shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record, if a mandatory procedural safeguard is not violated and if the approval or disapproval of the exercise of authority in question by the administrative hearing commission does not create a result or results clearly contrary to that which the court concludes were the reasonable expectations of the general assembly at the time such authority was delegated to the agency.

This Court recently explained the standard:

In reviewing the commission's decision, the Court may not determine the weight of the evidence or substitute its discretion for that of

the administrative body; the Court's function is to determine primarily whether competent and substantial evidence upon the whole record supports the decision, whether the decision is arbitrary, capricious, or unreasonable, and whether the commission abused its discretion.

*Psychare Mgt. v. Dept. of Social Services*, 980 S.W.2d 311, 312 (Mo. banc 1998). See also, *Blevins Asphalt Constr. Co. v. Director of Revenue*, 938 S.W.2d 899, 900 (Mo. banc 1997). The issues presented by this appeal relating to the character and ownership of caskets and burial containers are questions of fact. *Cuivre River Electric Coop., Inc. v. State Tax Comm'n*, 769 S.W.2d 431, 436 n.1 (Mo. 1989)(whether property is a fixture is a factual issue); *State ex rel. Thompson-Stearns-Rogers v. Director of Revenue*, 489 S.W.2d 207, 215 (Mo. 1973)("meaning [of ownership] varies in the context in which the term is used"). As such, they are entitled to particular deference. *Cuivre River, supra*.

**II. THIS COURT SHOULD AFFIRM THE DECISION OF THE COMMISSIONER BECAUSE SUBSTANTIAL AND COMPETENT EVIDENCE SUPPORTED THE COMMISSIONER'S DECISION THAT (A) CASKETS AND CONTAINERS CONSTITUTE FIXTURES WHEN THEY ARE BURIED UNDER THE GROUND AND (B) TITLE AND OWNERSHIP OF THE BURIAL CONTAINERS AND CASKETS PASSES TO BUCHHOLZ'S CUSTOMERS AFTER THE BURIAL**

**A. The Relevant Taxation Statutes**

Buchholz paid sales tax on its sales of burial containers and caskets under the mistaken assumption that the sales constituted "sales at retail." By statute, a "(s)ale at retail" (subject to Missouri sales tax) means "any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." Mo.Rev.Stat. §144.010.1(10). Real property is not subject to sales or use tax. Real property includes land, structures and fixtures. Mo. Rev. Stat. §137.010(3).

**B. Burial Containers And Caskets Are Fixtures**

Missouri law uses a three-part test for determining whether personal property has become a fixture: "annexation to the realty, adaptation to the use to which the realty is devoted, and intent of the annexor that the object become a permanent accession to the freehold." *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 696 (Mo. banc 1975). Missouri law requires only

that "each of these elements ...be present in some degree, however, slight, before an item may be considered a fixture. *Id.* at 697. Buchholz produced substantial and competent evidence that caskets and containers satisfied each of the three elements.

## **1. Annexation**

Property may constitute a fixture "although the annexation be slight" and, therefore, the element of annexation is generally considered the least important. *Marsh v. Spradling*, 537 S.W.2d 402, 405 (Mo. 1976)(slight annexation) and *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 697 (Mo. banc 1975), *Wisdom v. Rollins*, 664 S.W.2d 37, 39 (Mo.App. S.D. 1984)(least important element). *See, e.g., Rosehill Gardens, Inc. v. Department of Revenue*, No. 97-002875 RV (Aug. 7, 1997) (mulch, rock and shrubs used in landscaping intended as fixtures). While the Director asserts that the dictionary definition of "annex" may be synonymous with "attach," Blacks Law Dictionary states that a "fixture" to real property includes an item "deemed to be affixed to land when it is...imbedded in it...(or) permanently resting upon it...." Black's Law Dictionary at 574 (5<sup>th</sup> Ed. 1979).

The Commissioner correctly concluded that "an item completely buried in a 6 1/2 foot grave is more than slightly annexed; it is as annexed to real property as anything can be" (LF 18). Even without Missouri law's deference to "slight annexation," the evidence demonstrated that burial containers and caskets satisfy any practical definition of annexation.

Caskets are generally constructed of steel or wood (LF 112--SOF 12-13) and containers are made of steel or concrete (LF 113--SOF 17). Together, they constitute a burial system designed to house and protect the mortal remains. The caskets contain the deceased and the containers hold the casket and maintain the integrity of the burial site after interment (LF 114--SOF 16).<sup>4</sup> Containers have no utility independent of burial (T 28). The entire system weighs over 3000 pounds and requires the use of special equipment to lower its components into the excavated grave (LF 112-13--SOF 13, 18; T 55-56). Once lowered, the system is covered with dirt and graded to conform to the original condition of the land (LF 114--SOF 24). The system is not only annexed, it is fully integrated into the real estate with the intent that it never leave.

The Director argues that burying the containers and caskets does not attach them to the real estate because, in the Director's estimation, some other mode of attachment is required. How else can something be attached to dirt?

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<sup>4</sup> The fact that caskets are otherwise separable from the containers does not alter the analysis because both are components of an integrated burial system. For example, in *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 697 (Mo. banc 1975), this Court ruled that drapes, which were obviously removable, "became an integral part of the instrument designed for use in connection with the window in the guest's room" and, thus, constituted fixtures of the motel.

Under the Director's logic, drain pipes, watering systems, trees, fence posts and the like, which are merely buried in the ground would not be fixtures. Taking the Director's argument to its logical extreme, houses, buildings and other structures that merely rest upon the earth, or are annexed only by foundations buried in the earth, would not constitute fixtures. The Director's position cannot be reconciled with its Letter Ruling 1007 (May 28, 1998), in which the Director concluded that cemetery markers placed on a concrete footing that varied between several inches to several feet below the surface were fixtures.<sup>5</sup> A casket placed 6 1/2 feet below the earth is certainly less likely to become disengaged from its surrounding earth than a grave marker placed on a footing of a few inches.

The possibility of disinterment, which is a remote and rare occurrence (T 48, l. 13-15), does not transform the containers and caskets into

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<sup>5</sup> While not cited as precedent, the letter ruling exemplifies that the ordinary meaning of “attached” includes items buried or imbedded, even if only a few inches, in or next to a grave. In addition, the Respondent did not apply its regulation 12 CSR 10-3.060 (rescinded Sept. 30, 2001 but in effect at the time of the ruling), which treated sales of monuments and grave markers as personal property. The absence of the regulation in the ruling indicates that the regulation is inapplicable when title transfers subsequent to the annexation of the item to the gravesite.

personalty. The fact that, on rare occasions, property originally annexed might be severed does not vitiate its original characterization as a fixture:

The fact that a few cabinets had, over a period of years, been removed to make changes desired by the contractor, does not, in our view, alter the result. That situation was an exception, and apparently a thing which seldom occurred. It might be considered as done at the owner's request to fulfill what he regarded as an implied warranty, or through a supplemental agreement to repair, replace or satisfy some change of mind, *after* the original passage of title. We decide this case in the light of the procedure followed in the great majority of the cases, and of the intent of the annexor at the time of installation.

*Marsh*, 537 S.W.2d at 405 (emphasis in original).

Contrary to the Director's argument, the rare occurrence of disinterment does inflict damage to the gravesite and container. Due to the significant size and weight of the casket and burial container, neither can be removed from the grave without first excavating the gravesite (T 57, l. 3-12). Removal of the casket and container requires the use of specialized equipment (T.

57, l. 13-17). In those cases involving removal of the casket alone—e.g., to transport it to another cemetery, the process leaves a useless container in the gravesite (T 57, l. 25; 58, l. 1-7). True, a gravesite can be restored with backfill and grading, but a skillful tradesman can restore drywall after the removal of cabinets (*Marsh*) or drapes (*Sears, Roebuck*). The test is not whether the premises can be restored post-removal, but whether they are disrupted during removal.

## **2. Adaptation**

The adaptation element requires that the article be “adapted to use to which the realty is devoted,” *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 697 (Mo. banc 1975) and “refers to the characteristics of fitness or suitability [of the fixture] for the ... premises in question.” *Hoffman Mgmt Corp v. S.L.C.*, 800 S.W.2d 755, 760 (Mo.App. 1990).

It is difficult to improve upon the Commissioner's conclusion that

a cemetery is designed as a place for digging

graves, graves for receiving caskets, and caskets

for holding dead bodies. The record shows that

some cemeteries require containers to maintain

the surface of the grave after the casket and

remains have dissolved.

(LF 18).

The Director argues that containers and caskets fail the adaptation element because they are manufactured to standard sizes and buried without



alteration in their original condition. Although no Missouri case includes the requirement, the Director concludes that a fixture must be "specifically designed, created or altered to be attached to the real estate" (A.Br. 16). The Director thus alters the historical analysis of Missouri courts from whether the item is "adapted" to the particular use of the realty to whether it is "modified" to suit the particular use. The Director's reasoning would dictate the anomalous result that all standard size items commonly thought of as fixtures, such as PVC piping, ceiling lights and fans, doors with pre-hung frames and standard sized or "stock" kitchen cabinets, are not adapted to the property to which they are attached.

The only case cited by the Director, *Oberjuerge Rubber Co. v. State Tax Comm'n*, 674 S.W.2d 186 (Mo.App. E.D. 1984), happened to involve a building specifically designed for the use of the overhead cranes at issue. There is no indication that the *cranes* were modified prior to installation and the appellate court acknowledged that they were only "slightly attached." *Id.* at 188. The court did not rule that either the cranes or the building had to be modified to satisfy the adaptation requirement. Rather, after citing the accepted standard for adaptation, the court described the arrangements made for the installation and use of the cranes, which is no different than the situation presented here. *Id.*

Cemeteries are, to use this Court's language, specifically "devoted" to the burial of human remains. *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 696 (Mo. banc 1975). Installation of the casket and container requires the alteration and preparation of the cemetery property--namely, the

construction of the gravesite. Both caskets and burial containers are specifically designed for below ground interment and their suitability for cemetery burials cannot seriously be questioned.

### **3. Intent**

Buchholz and the Director agree on at least one thing: Intent is the most important of the three factors.

A particular emphasis is laid on the element of intent; this means, as we understand it--did the annexor intend to make it a permanent accession to the land? And the intent is shown generally by one's acts and conduct and not by any secret intention.

*Marsh*, 537 S.W.2d at 404. *See* A.Br. 16. As suggested by the above quotation from *Marsh*, intent is an "objective test, to be determined from the annexor's acts and conduct and the surrounding facts and circumstances." *Cuivre River Electric Coop. v. State Tax Comm'n*, 769 S.W.2d 431, 436 (Mo. 1989).

Substantial and competent evidence established the objective (and, for that matter, subjective) intent of everyone associated with the burial that the mortal remains be "permanently acceded to the land" (Decision at 11, LF 19). Although the conclusion is self-evident from the purpose of burial arrangements, the method of installation and burial erases any doubt of the parties' intent to permanently affix the casket and container to the real estate. A casket and

container together can weigh as much as 3300 pounds and must be closed and lowered into the grave using specialized equipment and labor (LF 112-13--SOF 13, 18; T 55-56). They are buried 6 1/2 feet under the ground, covered with dirt and can only be removed using specialized heavy equipment (T 57, l. 3-17).

It is common understanding that graves are intended to constitute the deceased's final resting place in all but the most unusual circumstances--it is the very and sole reason for burial. Hence, the family will typically mark the grave with messages on markers and monuments of "rest in peace" and the like.

The evidence of all the parties' subjective intention supports the conclusion. The essence of the funeral services contract is an arrangement for the final burial of the deceased, and payment is not due until that service has been rendered (LF 213). The record contains an explicit statement of the parties' intention:

Q. And certainly at the time that the casket  
is placed into the vault or box and the  
remains are buried, **its your intention  
and your customer's intention** that this  
be a final resting place for the deceased?

A. That's -- 99 and three-quarter's percent of  
the time, yes.

(T 48, l. 16-22; emphasis added).

The Director asks the Court to ignore all of the foregoing objective and subjective indicators of intent and to decide this critical issue based solely upon Buchholz's prior payment of sales tax on its sales of containers and caskets (A.Br. 17-18). Buchholz's incorrect tax treatment of these sales is, of course, why we are before this Court. To hold that Buchholz's prior payment of sales tax is determinative or even relevant would create a Catch 22 and essentially eliminate refund claims altogether. A taxpayer's payment of challenged taxes would become both a prerequisite and an absolute defense to refund claims. The Director acknowledges this paradox, only to dismiss it because the Director believes that caskets and containers are not fixtures anyway (A.Br. 18). No harm, no foul. However, taxation turns on the economic realities of the transaction, not a taxpayers' characterization of a transaction. *Scotchman's Coin Shop, Inc., v. Administrative Hearing Comm'n*, 654 S.W.2d 873, 875 (Mo. banc 1983).

The Director asserts that the Supreme Court of Connecticut has suggested that vaults might not be fixtures if removed during disinterment, citing to *dicta* in *Norwalk Vault Co. of Bridgeport v. Mountain Grove Cemetery Ass'n*, 433 A.2d 979, 982 (Conn. 1980). The Connecticut court began its discussion with the admonition that "[w]hether these crypts may be characterized as personal property...in a dispute between...a funeral director and a vault purchaser, is irrelevant in the present case." *Id.* at 982. The Connecticut court did not have to decide that disinterment coupled with removal of vaults would justify re-characterizing vaults as personalty because the evidence established that the vaults

at issue were not removed during disinterment. The court merely concluded that the fact that double depth vaults were not removed during disinterment was consistent with a finding that they were fixtures. *Id.* The court's loose language in footnote 9 of the opinion cited by the Director must assume that disinterment is a frequent occurrence in Connecticut anticipated at the time of burial, which is not the evidence here. Otherwise, the court's *dicta* would put it with odds with the settled rule in Connecticut (and Missouri) that "the intention of the parties, objectively manifested as of the date when the personalty was attached to the freehold, is the primary or essential test for determining whether an object has become a fixture." *Merritt-Chapman & Scott Corp. v. Mauro*, 171 Conn. 177, 182, 368 A.2d 44 (1977).

The inference that the Director tries to draw from the Connecticut decision is also contrary to this Court's ruling in *Marsh* that occasional removal of fixtures does not override the parties' intent at the time of annexation. The Connecticut decision is, in any event, of scant precedential significance. *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207 (Mo. 1973)("[i]n view of the fact that the legal incidence of the tax depends upon the particular taxing statute, little is to be gained by reference to cases in other jurisdictions construing statutes of such jurisdictions, dissimilar from that of this state").

Finally, the Connecticut decision is contrary to the only Missouri law found explicitly discussing ownership rights in a casket. Both the Commissioner and Director refer to *Guthrie v. Weaver*, 1 Mo.App. 136 (Mo.App.

E.D. 1866), a case involving a dispute between a father and his son in law over custody of the daughter/wife's remains. Strictly speaking, the case was postured as replevin action brought by the son in law to recover the casket that was originally buried in the father's burial plot. By the time that the case reached trial, the daughter had already been disinterred and re-buried in the lot of the son in law's mother. The father counter-claimed for replevin and breach of contract (based upon the notion that plaintiff and defendant agreed upon the original burial). The court reversed a judgment for the son-in-law and entered a judgment for the father for "1 cent damages and costs." *Id.* at 144. In the course of rendering its judgment, the court discussed the character of the casket and remains:

There is no property in a corpse; the relations have, in regard to it, only the right of interment, and this right having been once exercised...no right to the corpse remains except the right to protect it from insult....There is no evidence whatever as to the value of the coffin after it had been used for burying the dead, and in our opinion, **there was no property in it**, either in plaintiff or defendant, nor is there any property in it at all **in the sense that it could be made an article of merchandise.**

*Id.* at 143-44 (emphasis added).

The Commissioner correctly determined, based on competent and substantial evidence, that the caskets and containers constitute fixtures once buried and therefore are not subject to sales tax unless title or ownership passes to the customer prior to burial.

**C. Title And Ownership To Caskets And Containers**

**Passes To The Customer After Burial**

Generally, a taxable sale for Missouri sales tax purposes occurs on the "transfer...of the ownership of, or title to, tangible personal property...."

Mo.Rev.Stat. §144.010.1(10).

**1. The Director did not raise and therefore waived  
any argument relating to the passage of title (versus  
ownership)**

The Director argues exclusively that ownership of caskets and burial containers transfers to customers prior to burial and did not raise the issue of transfer of title in its points relied on. The Director therefore waived any argument that title transfers to customers prior to burial. *See, e.g., Hastings v. Coppage*, 411 S.W.2d 232 (Mo. 1967). This is important because, in the usual case, the taxable event is the moment when title passes from seller to buyer. *Shell Oil Co. v. Director of Revenue*, 732 S.W.2d 178, 181 (Mo. banc 1987).

**2. The Director makes no serious argument relating to transfer of ownership to burial containers**

The Director mentions the word "container" twice in its argument relating to passage of ownership, once in the introductory sentence and a second time only to mention that the customer chooses the type of container (A.Br. 20, 22). The Director makes no serious argument that the customer owns the burial container prior to burial and no such argument could be supported from the record.

The customer does not see the container prior to burial (LF 113--SOF 19). As already mentioned, containers are extremely large vessels that require special equipment to deliver and install. Typically, the burial container company supplies the equipment and manpower to complete the installation (T 55, 1.10-25; T 56, 1. 1-17; T 58, 1. 8-25; T59, 1. 1-7). The customer naturally does not expect and is not entitled to exercise any dominion over the container prior to burial:

Q: Certainly the vault company's responsibility for lowering and installing the vault is not completed until it is completely lowered into the grave, correct?

A: Uh-huh.

Q: Yes?

A: I'm sorry. Yes.



Q: You don't look to -- under any circumstances, you don't look to the, what Mr. Clements has called the family, to complete the installation, do you?

A: No. They cannot.

Q: All right. I mean, they'd be somewhat surprised, wouldn't they, if you said, okay, your vault is here; lower it, right?

A: They wouldn't be allowed to do it probably.

(T 63, l. 25; T 64, l. 1-16).

**3. To the extent that ownership is severable from title under these circumstances, Buchholz does not transfer ownership of the caskets to customers until the completion of burial.**

In *Olin Corp. v. Director of Revenue*, 945 S.W.2d 442, 444 (Mo. 1997), this Court recognized that, in the usual case, title and ownership are synonymous:

Indeed, at common law, title is prima facie evidence of ownership. *Missouri Mexican Products, Inc. v. Dunafon*, 873 S.W.2d 282, 285 (Mo.App. 1994). Although title and ownership will not always be held by the same

entity, these interests will usually be acquired simultaneously by the same entity.

In *Olin* and one earlier case, *Thompson-Stearns-Rogers v. Director of Revenue*, 489 S.W.2d 207 (Mo. 1973), the Court recognized a limited exception to the unity of interests in the case of three party government purchasing contracts. In both *Olin* and *Thompson-Stearns*, the government contracts required that title to all property purchased by the contractors vest in the government. In *Thompson-Stearns*, the contractor nevertheless retained the right to transfer title, which the Court viewed as sufficient dominion over the property to vest "ownership" in the contractor in the absence of technical legal title. *Thompson-Stearns*, 489 S.W.2d at 215. In *Olin*, the taxpayer "had no discretion in this matter, and no actual ability to designate who would receive title, [and therefore] had no ownership interest in the property." *Olin*, 945 S.W.2d at 444.<sup>6</sup>

In *Olin*, this Court also rejected the taxpayer's fallback argument that it had dominion over the property beyond control over title sufficient to constitute "ownership." The Court found that the government contract limited the use and

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<sup>6</sup> There is really not much, if anything, left to this Court's decision in *Thompson-Stearns*, which is the only case found turning upon a substantive distinction between title and ownership. In *Olin*, this Court stated: "To the extent that *Thompson-Stearns-Rogers* found an ability to designate title based on virtually identical facts, it is overruled." *Olin*, 945 S.W.2d at 444.

disposition of the property to those specified in the contract, which eliminated any meaningful control in the taxpayer. *Id.* at 444.

It seems doubtful that any distinction between title and ownership pertains outside the unusual government contract scenario. As this Court recognized in *Olin*, title and ownership are transferred simultaneously in the typical case. *Olin*, 945 S.W.2d at 444. This should nearly, if not always be the case in routine two-party, buyer/seller transactions where the seller is not willing to relinquish ownership so long as the seller retains the risk of loss, and the buyer is not willing to assume risk of loss without ownership.

Here, in general contemplation of law neither title nor ownership passed until delivery. There is reason behind the conceptual approach, for risk of loss in transit remained in the seller.

*May Dept. Stores Co. v. Director of Revenue*, 748 S.W.2d 174, 176 (Mo. 1988).

That is the case here. By custom, and out of regulatory necessity, Missouri funeral directors retain dominion over the casket until burial is complete. Division 120 of the Department of Economic Development regulations governs the State Board of Embalmers and Funeral Directors. 4 CSR 120-2.070(23) provides in full as follows:

(23) **No dead human body shall be buried,**  
interred, cremated, or be removed from this  
state, **unless the burial**, interment, cremation,

removal, or other authorized disposition, **is performed under the direction of a Missouri licensed funeral establishment** or a Missouri licensed funeral director who is engaged in the practice of funeral directing in a licensed funeral establishment in an adjacent and contiguous county to the state of Missouri.  
(emphasis added)

Failure to abide this directive constitutes "misconduct" under the regulations:

(12) It shall be considered misconduct in the practice of funeral directing for a licensed funeral director to permit any unlicensed person **to engage in, or take charge of,** the activities for which a license is required by law.

4 CSR 120-2.060(12)(emphasis added).

Buchholz retains the risk of loss to caskets until the completion of burial and maintains insurance to cover that risk (T 18, l. 21-25; T 19, l. 1-14). The customer has no expectation, and likely would be surprised to learn that he bears any risk of loss from damage to the casket while it is within Buchholz's control, or that he bears any responsibility for ensuring that either the casket or burial container reaches its final resting place (T 64, l. 7-23).

It is true that a customer can *request* certain types of services or the place of burial (T 49, l. 4-22). However, as with the contractor in *Olin*, the customer's requests can only be met if they comport with the regulatory and contractual guidelines mandating the funeral director's supervision and control over movement of the casket, visitation and burial (*Id.* See also T 15, l.20-25; T 16, l. 1-13).

The customer does have the right to take its business elsewhere, as the Director points out (A.Br. 23-24). However, Buchholz cannot honor even that request until Buchholz receives assurance that the casket will be transferred to the control of another licensed funeral director (T 26, l. 20-24; T 27, l. 1-4). Before relinquishing title to the casket, Buchholz would demand payment in full (T 50, l. 12-17). Recognizing that title would transfer prior to burial in that instance, Buchholz would expect to pay sales tax on the sale (T 50, l. 18-22).

The customer understandably looks to Buchholz to deliver and install the casket and arrange for the delivery and installation of the Burial Container. The regulations governing the preparation and interment of a deceased's remains, as well as the sheer size of these fixtures, mandate what is obviously and clearly the parties' intent when they contract: Ownership of the casket and burial container do not transfer to the client until the items have been placed into the grave as a fixture to the real estate.

## **CONCLUSION**

The Decision of the Commissioner should be affirmed.

Respectfully submitted,

STONE, LEYTON & GERSHMAN,  
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Dated \_\_\_\_\_

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**CERTIFICATE OF SERVICE  
AND OF COMPLIANCE WITH RULE 84.06**

The undersigned hereby certifies that Respondent's Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and Local Rule 360, and contains 6,521 words as determined by the undersigned's word processing system. I further certify that the attached 3.5 floppy disk which contains a copy of the Respondent's Brief was scanned with the Anti Virus program and was found to be free from viruses.

The undersigned hereby certifies that two hard copies and one floppy disk were mailed, postage pre-paid on the 24th day February, 2003 to:

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